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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, A NATIONAL BANKING ASSOCIATION, WALTER E. HELLER INTERNATIONAL CORPORATION AND RONALD J. GRAYHECK,

Petitioners,

v.

HAROCO, INC., A CORPORATION, ROMAN CERAMICS, INC., A CORPORATION, CALIFORNIA ORIGINALS, INC., A CORPORATION, AND MIKE WAYNE DISTILLED PRODUCTS CO., A CORPORATION,

Respondents.

BRIEF FOR RESPONDENTS

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STATEMENT OF THE CASE[1]

Count I seeks judgment against American National Bank ("ANB"). (App. 64) Respondents borrowed money from ANB on eleven occasions during the period February 1979—April 1981. (App. 59-60, ¶¶ 10-13) The rate of interest was stated as an increment over ANB's prime rate (for example, "one percent over the bank's prime rate"). The loans, and numerous bills for interest thereafter, were based on ANB's representation that ANB would charge interest based on ANB's true prime rate. (App. 60, ¶ 14) At the time of each loan, ANB fraudulently concealed ANB's intention to declare and use a falsely excessive prime rate; thereafter, ANB concealed its true prime rate, declared and published falsely excessive prime rates and collected interest from Respondents on those fraudulent bases. (App. 60-61, ¶¶ 16-17)[2] The fraudulent acts and practices occurred on many occasions subsequent to February 1979. (App. 61, ¶ 18)

ANB is a bank that conducted Heller International Corp.'s commercial banking operations (App. 58, ¶¶ 3-5); ANB was a person that conducted, and participated in the conduct of, Heller's business and affairs. (App. 58, ¶ 5; App. 62, ¶ 20).

Count II, alleging the same acts of wrongdoing, seeks judgment against Heller and Grayheck. (App. 65) Ronald S. Grayheck was an officer and director of ANB. (App. 59, ¶ 6; App. 64, ¶ 25) Greyheck was a person who conducted, and participated in the conduct of, ANB's business and affairs

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[1] Petitioners' summary of the claim is unduly contentious and incomplete. This supplementary statement of the claim is necessary to cure those deficiencies. References herein are to the Appendix ("App. ____") to the *certiorari* Petition.

[2] The concluding sentence of Petitioners' summary of the claim understates the fraud claims ("In other words, Respondents allege that ANB employed a method to calculate prime rate in a manner different than that contained in the promissory notes"). (Petrs. Brf., 5)

through those fraudulent acts. (App. 60, ¶ 15; App. 61-62, ¶ 19) ANB was a wholly owned subsidiary of Heller and, during part of the relevant period, ANB was a wholly owned subsidiary of American National Corporation which was a wholly owned subsidiary of Heller. (App. 58-59, ¶ 5) A substantial portion of Heller's commercial banking business was conducted through ANB. (App. 58, ¶ 5; App. 64, ¶ 25) Various officers and directors of Heller were officers and directors of ANB. (App. 64, ¶ 26) Grayheck and Heller were persons that committed the mail frauds while conducting, and participating in the conduct of, the business and affairs of ANB. (App. 64, ¶¶ 24, 26)

SUMMARY OF ARGUMENT

Petitioners' brief fails to address the question on which this Court granted *certiorari*. The question presented is whether a RICO[3] plaintiff must show more than damage solely by reason of the defendant's commission of the statutorily proscribed offenses. That question requires interpretation of 18 U.S.C. § 1964. Its resolution affects only civil cases.

Instead, Petitioners urge this Court to interpret Section 1962, the part of RICO that defines the violations for both criminal and civil cases. The arguments of Petitioners were neither made in nor considered by the District Court or the Court of Appeals. In addition, Petitioners' arguments have no place in this case because the persons sued are "managers", whose unlawful conduct was clearly integral to their respective enterprises.

Section 1962(c) embraces offenses committed by any person in the course of his association with an enterprise or

[3] RICO is an acronym for the Racketeer Influenced and Corrupt Organizations provisions of the Organized Crime Control Act of 1970 (herein "the Act"), Title IX of Pub. L. No. 91-452, 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961-1968).

while participating in its affairs, at any level of the enterprise. This is made clear by Congress' avoidance of words imparting supervision or direction and Congress' intended meaning of the word "conduct" elsewhere in the Act. The interpretation urged by Petitioners of the word "conduct" would insulate those low level criminals who most frequently commit RICO's predicate offenses.

Section 1962(c) embraces offenses irrespective of how unimportant the offenses may be to the enterprise, compared with the rest of the enterprise's affairs. Petitioners' argument would exclude from RICO's coverage almost all instances in which persons loot enterprises or abuse their enterprise-based positions, such as in bribery, kickbacks and bankruptcy fraud. Petitioners' interpretation would encourage, rather than discourage, infiltration of criminals into legitimate businesses.

There is no such thing as a distinct "RICO" or "racketeering" injury. The District Court incorrectly required that a civil claim survive a but-for test regarding the connection between the pattern of racketeering activity and the injury. The decision of the District Court and the opinions endorsed by it merely renew the discredited notion that RICO only covers activities committed by "organized crime". The language of the Act, including the grant of a private treble damage remedy, shows Congress' intention to attract broad and energetic private enforcement of RICO. It is not up to the courts to frustrate Congress' intentions, irrespective of the burdens imposed on the courts.

The interpretations urged by *amicus* American Bankers Association are outside the question presented and are inapposite to this case. Those arguments also inject unsupportable and unworkable definitions into the statute.

ARGUMENT

Introduction

Respondents first respond to Petitioners' arguments. In Part II, Respondents discuss the question presented. In part III, we respond to the arguments of *amicus* American Bankers Association.

I

PETITIONERS' ARGUMENTS ARE BOTH INCORRECT AND NOT PROPERLY BEFORE THE COURT

Introduction

The District Court dismissed the complaint because it failed to allege any injury other than the injuries resulting from the mail fraud (*Haroco,* App., 3),[4] based on the District Judge's conclusion that injuries resulting from the predicate acts are insufficient.[5] (*Haroco,* App., 5) In the Court of Appeals, Petitioners argued that "Plaintiffs failed to allege the requisite causal relationship between their injuries and the RICO violations" (*Haroco,* App., 3) and that Plaintiffs "had not alleged the proper *type of injury* for a RICO claim". (*Haroco,* App., 13) (Emphasis added)

Apparently recognizing the futility of their arguments in the Seventh Circuit, Petitioners now shift to a pair of entirely new arguments never made in or considered by the Seventh Circuit: (1) that in order for a person to "conduct" the affairs of an enterprise he must be in a managerial position (Petrs. Brf., 11, 17), and (2) that the offenses must comprise an integral part of the enterprise's business.

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[4] Citations to the Seventh Circuit's opinion in this case are to the Appendix to the *certiorari* petition: "(*Haroco,* App., _____)".

[5] The term "predicate acts" refers to the racketeering activities enumerated in 18 U.S.C. § 1961(1).

Moreover, Petitioners' arguments would not be dispositive of this case. Accordingly, Petitioners' arguments ought not be considered. However, we respond to them herein, in case this Court desires to rule on Petitioners' contentions.

A. Petitioners' Arguments Are Not Properly Before This Court

Petitioners' first point is that there is no violation of Section 1962(c) unless it is proved that the person who "conducts" the affairs of an enterprise occupies a high enough level of authority to "lead", "direct the course of", "manage" or "have the direction of" the enterprise. (Petrs. Brf., 17) The question presented does not call for interpretation of Section 1962, which defines the RICO criminal offenses. The question presented *assumes* a violation of Section 1962(c) (as did the Seventh Circuit) and calls for interpretation of the "by reason of" clause in Section 1964(c). As stated by the Seventh Circuit:

> The central issue concerns the type of injury a private civil plaintiff must allege to support a RICO claim under 18 U.S.C. § 1964(c).

(*Haroco,* App., 1)

Certiorari was not sought on the issues now raised by Petitioners' arguments. Since those issues are outside the question presented, it is improper for Petitioners to raise them. Supreme Court Rule 34.1(a). Since Petitioners did not make these arguments below, Petitioners have waived them.[6]

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[6] One of Petitioners' waived arguments, that a person must "conduct" the enterprise's affairs from a managerial loft, goes to the conduct of ANB's affairs by Grayheck and Heller. Regarding Heller's conduct of ANB's affairs, the Seventh Circuit explicitly declined to rule since "the Defendants have not raised the point and the district court did not pass on it". (*Haroco,* App., 38, n.23)

B. The Act Does Not Require That The Offender Be A "Manager" Or That His Offenses Comprise An Important Aspect Of The Enterprise's Affairs

Section 1962(c) provides:

> It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . ."

Petitioners' argument that there is no RICO violation unless the person committing the crimes "managed" the enterprise, would read Section 1962(c) as though it provided: any person who "manages or directs the affairs of an enterprise". As stated in *Russello v. United States,* ____ U.S. ____, 104 S. Ct. 296, 300 (1983), "the short answer is that Congress did not write the statute that way".

The statute includes any persons who "participate . . . in the conduct of such enterprise's affairs". The ordinary meaning of the word "participate" is "to take part", "to have a part or share in something". *Webster's New Collegiate Dictionary,* 845 (1973). The statute is not limited to persons who "conduct" the enterprise's affairs but includes persons who take part (*any* part) in the conduct of the enterprise's affairs.

Petitioners' suggested interpretation also elides the phrases "employed by", "associated with" and "directly or indirectly". If Congress intended the narrow meaning imparted by Petitioners, mere employees would not be covered, nor would persons merely "associated with" any enterprise be covered, especially inasmuch as the terms of the statute cover persons "indirectly" associated with the enterprise. The purpose of these terms in Section 1962(c) was to cover both insiders and outsiders. *Schacht v. Brown,* 711 F.2d 1343, 1360 (7th Cir.), *cert. denied,* 104 S. Ct. 508 (1983). As stated in *Schacht:*

> Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise. (Citations and footnote omitted)

(*Id.*)

The resolution of questions of statutory interpretation is aided by reference to interpretation of other statutory provisions using the same language regarding the same general subject. *Northcross v. Bd. of Ed. of Memphis City Schools,* 412 U.S. 427, 428 (1973) (per curiam); *de los Santos v. INS,* 525 F. Supp. 655, 666 (S.D.N.Y. 1981), *aff'd,* 690 F.2d 56 (2d Cir. 1982); *Cook v. Budget Rent-A-Car Corp.,* 502 F. Supp. 494, 500 (S.D.N.Y. 1980). While the verb "conduct" was not defined in the Senate or House reports on RICO, the use of that word in Title VIII of the Act[7] was explained as follows:

> The term 'conduct' refers both to high level bosses and street level employees.

H.R. Rep. No. 1549, 91st Cong., 2d Sess., 52-54 (1970) (commenting on 18 U.S.C. §§ 1511 and 1955). Congress could hardly have intended the word "conduct" to have two different meanings in the same statute.

The absence of the words "manage" and "control" in Section 1962(c) is significant in light of Congress' use of those words elsewhere in Title VIII which provides, in part, as follows:

> Whoever conducts, finances, *manages, supervises, directs,* or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both. (Emphasis added)

18 U.S.C. § 1955(a). *See also,* 18 U.S.C. § 1511 (same language). If Congress thought the word "conducts" means only "manages" or "directs", Congress would have seen no need to include those words in § 1955(a).

The meaning of the word "conducts" in Title VIII is instructive. This Court has held that in 18 U.S.C. § 1955, it means "any degree of participation" in an illegal gambling

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[7] Pub. L. No. 91-452, Title VIII, § 802-803, 84 Stat. 936-938 (codified at 18 U.S.C. §§ 1511, 1955).

business (except participation as a mere customer). *Sanabria v. United States,* 437 U.S. 54, 70 (n.26) (1978).[8]

Not surprisingly, Petitioners do not cite a single court agreeing with their argument. Virtually all of the courts confronting this and related arguments have concluded that an individual conducts or participates in the activities of an enterprise through a pattern of racketeering when: (1) the defendant's relationship with the enterprise facilitates his commission of the offenses, and (2) the predicate offenses are related to or have some effect on the enterprise.[9] In accord with these principles, low-level functionaries within an enterprise and individuals outside the enterprise have routinely been held accountable under Section 1962(c).[10]

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[8] Under Section 1955, numerous non-managerial employees and associates were held to have "conducted" illegal gambling activities. *See, e.g., United States v. Merrell,* 701 F.2d 53, 55 (6th Cir.), *cert. denied,* 103 S. Ct. 3558 (1983) (waiter/janitor); *United States v. Colacurcio,* 659 F.2d 684, 688 (5th Cir.), *cert. denied,* 455 U.S. 1002 (1982) (waiter/security guard); *United States v. Mackey,* 551 F.2d 967, 969 (5th Cir. 1977) (street sellers); *United States v. Manson,* 494 F.2d 804, 807 (7th Cir.), *cert. denied,* 419 U.S. 994 (1974) (runners).

[9] *See, e.g., United States v. Jannotti,* 729 F.2d 213, 226 (3d Cir.), *cert. denied,* 105 S. Ct. 243 (1984); *United States v. Cauble,* 706 F.2d 1322, 1332-3 (5th Cir. 1983), *cert. denied,* 104 S. Ct. 996 (1984); *United States v. Provenzano,* 688 F.2d 194, 200 (3d Cir.), *cert. denied,* 459 U.S. 1071 (1982); *United States v. Scotto,* 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied,* 452 U.S. 961 (1981).

[10] *See, e.g., United States v. Ambrose,* 740 F.2d 505, 512 (7th Cir. 1984) (policemen protecting narcotics dealers); *United States v. Truglio,* 731 F.2d 1123, 1133 (4th Cir.), *cert. denied,* 105 S. Ct. 197 (1984) (courier for prostitution ring); *Schacht v. Brown,* 711 F.2d at 1360 (outside corporation); *United States v. Martino,* 648 F.2d 367, 382 (5th Cir.), *cert. denied,* 456 U.S. 949 (1982) (low echelon participants in arson ring); *United States v. Chovanec,* 467 F. Supp. 41, 44 (S.D.N.Y. 1979) (broker for enterprise). Regarding persons outside the enterprise, *Bennett v. Berg,* 710 F.2d 1361, 1364 (8th Cir. 1983) (*en banc*), appears to be *contra* ("some participation in the

(Footnote continued on following page.)

When an offered interpretation conflicts with the plain meaning of the words used by Congress, there must be something in the legislative history or the statement of Congress' purpose to justify it. *Consumer Product Safety Commission v. GTE Sylvania,* 447 U.S. 102, 108 (1980). Even then, it is "a step to be taken cautiously". *American Tobacco Co. v. Patterson,* 456 U.S. 63, 75 (1982). The only legislative history cited by Petitioners (Petrs. Brf., 20-21) is a remark of Congressman Celler which did not purport to describe his view of the full extent of RICO's coverage: "The conduct of the affairs . . . by a person acting in a managerial capacity . . . is also proscribed". 116 Cong. Rec. 35,196 (1970). The fact that managerial misconduct is included does not support the negative inference that offenses committed at lower levels are excluded. *Cf. United States v. Turkette,* 452 U.S. 576, 591 (1981).

Instead of effectuating Congress' intention to eradicate organized crime and its evil influences, *Turkette,* 452 U.S. at 589, Petitioners' interpretation would lead to absurd consequences. For example, the exclusion of all offenders except an enterprise's managers would insulate the low level operatives of organized crime who typically engage in murder, kidnapping, arson, extortion—the most frightening of the predicate acts—on orders from higher ups. It is very doubtful that Congress intended to deprive United States Attorneys of the potent immunity weapon routinely used to obtain the cooperation of foot soldiers in order to convict their overlords.[11]

(Footnote continued from preceding page.)

operation or management of the enterprise" is required) but it is unclear whether the court intended the words "operation" and "management" to mean different things.

[11] Statement of Sen. McClellan, 116 Cong. Rec. 18,913 (1970) (One of Congress' principal concerns was the apparent "immunity from legal accountability" enjoyed by organized crime, especially "organized crime leaders").

Congress clearly intended RICO to embrace all functionaries who engage in patterns of racketeering activity, not just those who direct or manage the enterprises with which they are associated.

Petitioners next argue that Section 1962(c) is violated "only when the racketeering activity is being used as an integral part of the enterprise's affairs" (Petrs. Brf., 17); Petitioners equate that with racketeering activity which is "an inseparable part of the management of the business". (Petrs. Brf., 18) This argument again imbeds the misapprehension that "management" of the enterprise is RICO's only focus.

Simply stated, Petitioners' argument is that Section 1962(c) requires that the pattern comprise an important part of the enterprise's business. According to Petitioners, this is necessary in order to give any effect to the words "conduct", "affairs" and "through". As stated by Petitioners, Section 1962(c) was not violated because the alleged acts of racketeering were "merely incidental to ANB's banking business" (Petrs. Brf., 18) and "even more incidental" to Heller's ownership of ANB. (*Id.*) This suggestion of how Section 1962(c) ought to be interpreted is supported by no citations of cases, commentaries, or legislative history. This interpretation impermissibly constricts the application of Section 1962(c).

If it were necessary to show that every RICO defendant's unlawful participation was an integral or important part of the enterprise's business, rather than an "incidental" or "unimportant" part of its business, proof would be required of the full range of the enterprise's activities. Obviously, calculating the illegal portion of anything cannot be done without an assessment of the total. In cases of thoroughly corrupt organizations (as in *Turkette*), that would be virtually impossible because of the clandestine nature of such organizations. In cases involving legitimate enterprises (or partly legitimate enterprises), the

prosecutor or plaintiff would have to (1) portray the full scope and nature of all of the enterprise's business transactions, (2) portray the full scope and nature of the person's racketeering activities and (3) compare the two in order to assess the ratio between (1) and (2). Of course, Petitioners' theory would require both a quantitative and qualitative assessment of both the person's racketeering participation and the enterprise's other (lawful and unlawful) activities.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 493 (1968), an important reason for this Court's rejection of the passing-on defense was that it "would often require additional long and complicated proceedings involving massive evidence and complicated theories". Senator McClellan's statement offers ample support for observing that principle in the context of RICO:

> There is . . . no intention here of importing the great complexity of antitrust law enforcement into this field.

115 Cong. Rec. 9567 (1969).

Petitioners' interpretation of Section 1962(c) would encourage criminals to disperse their activities into the frameworks of numerous large and legitimate businesses, thereby placing themselves in remote and "incidental" corners of those enterprises. Petitioners' gloss on the word "participation" would thus provide the incentive to infiltrate legitimate enterprises. Clearly, that is not what was intended by the Act.

Both of Petitioners' arguments are tied to the incorrect view that RICO's sole target is the infiltration of organized crime into legitimate business. (Petrs. Brf., 15-16) Petitioners' argument elides Section 1962(c). Subsections (a) and (b) are aimed at infiltration: subsection (a) forbids the use of racketeering income to invest in an enterprise; subsection (b) forbids the use of racketeering activities to acquire or maintain an interest in an enterprise. Section 1962(c) has no element of "infiltration". Subsection (c) is aimed at illicit conduct that

occurs in conjunction with an enterprise, irrespective of the manner in which the person became associated with the enterprise. The person may have been hired at a time when the enterprise was completely legitimate or he may have become associated with it at a time when he did not intend to act illegally. Section 1962(c) does not require proof of a violation of Section 1962(a) or (b).

Requiring the offenses to be integral to the enterprise's management would nullify important parts of RICO. Looting an enterprise from within is one of the evil practices specifically decried by Congress, several forms of which are embezzlement, 18 U.S.C. § 1961(1)(B) and (C), and bankruptcy fraud, 18 U.S.C. § 1961(1)(D). In such crimes, an insider lines his pockets to the enterprise's detriment, not in furtherance of its business. Another evil targeted by RICO is criminal conduct in which a person abuses his position in an enterprise, for example, bribery. 18 U.S.C. § 1961(1)(A). Neither of these two principal targets of RICO involves racketeering activities that are "integral" to the enterprise's affairs. Under Petitioners' suggested view, none of these offenses would be a violation of Section 1962(c) (or *any* of the three subsections of Section 1962).[12]

Petitioners' argument thus comes full circle. Beginning with the premise that infiltration is the exclusive target of RICO, Petitioners end up with an interpretation of Section 1962(c) under which many offenses that injure enterprises would not result in criminal or civil liability.

The only necessary nexus between the racketeering activities and the enterprise's affairs is that the predicate acts take

[12] It is no answer to suggest that the defendant and his criminal confederates might comprise an enterprise (an "association") separate from the "business". In many cases the defendant/person may be acting without any confederates, for example where he is an embezzler; or he may have confederates but their existence might be unknown or not provable.

place in the course of the offender's participation in the enterprise. It is not required that the racketeering benefit or further the enterprise's business.[13] But if Petitioners' interpretation had been followed, many of the Government's recent successes in using RICO as an effective tool in the war against crime would have been impossible.[14]

Petitioners' statement that RICO was designed only for "circumstances in which the alleged racketeering activity is the means by which a person is conducting and directing the affairs of an enterprise" (Petrs. Brf., 11) puts it backwards. RICO applies where the enterprise is the means by which the person engaged in the racketeering activity.

C. Ruling On Petitioners' Arguments Would Have No Impact On This Case

In any event, the argument that only a "manager" is liable is futile because of the allegations that Petitioners "conducted" the enterprises, even in the narrow sense urged by Petitioners.

The complaint alleges that Grayheck was an officer and director of ANB (App. 59, 64) and Heller was ANB's wholly-owning parent. (App. 58-59) If ANB's affairs were not conducted or managed by its officers, directors or parent corporation, then ANB's business was not conducted by anyone. Similarly, ANB conducted Heller's affairs (App. 58, 62) and a "substantial portion" of the commercial banking oper-

[13] *See, e.g., Cauble,* 706 F.2d at 1333 (n.24); *Provenzano,* 688 F.2d at 200; *United States v. Hartley,* 678 F.2d 961, 990-1 (11th Cir. 1982), *cert. denied,* 459 U.S. 1170 (1983); *United States v. Welch,* 656 F.2d 1039, 1061-62 (5th Cir. 1981), *cert. denied,* 456 U.S. 915 (1982); *United States v. Webster,* 669 F.2d 185, 187 (4th Cir.), *cert. denied,* 456 U.S. 935 (1982).

[14] *See, e.g., United States v. Kovic,* 684 F.2d 512 (7th Cir.), *cert. denied,* 103 S. Ct. 304 (1982); *United States v. Welch,* 656 F.2d 1039 (5th Cir. 1981), *cert. denied,* 456 U.S. 915 (1982).

ations of Heller was performed by ANB. (App. 58, ¶ 5; App. 64, ¶ 25) Even by Petitioners' exaggerated view of what is meant by the word "conduct", far less involvement and direction of the affairs of these two enterprises would suffice.

Even if these allegations left doubt about whether the alleged persons occupied managerial and directional positions at high enough levels, it would be a matter of proof, not pleading. *See, Conley v. Gibson,* 335 U.S. 41 (1957). The complaint alleges that Heller and Grayheck were persons "who conducted, and participated in the conduct of, ANB's business and affairs". The truth or falsity of those allegations must be measured by Respondents' proof of facts, either at trial or by summary judgment. 2A *Moore's Federal Practice,* ¶ 8.13 at 8-119 (2d Ed. 1984).

Petitioners' second argument, that an integral relationship is required between the racketeering activity and the enterprise's affairs (Petrs. Brf., 17) is also futile. Petitioners assert that the complaint fails this test because neither Heller nor Grayheck was directing or managing ANB's business through the fraudulent practices (*Id.*) and that ANB did not conduct Heller's business through that pattern of racketeering activity. (*Id.,* p. 18)

Here again, the complaint meets even Petitioners' narrow test, alleging that ANB conducted Heller's business and affairs through the fraudulent loans and collections of interest (App. 61-62, ¶¶ 19, 20) and that Grayheck and Heller conducted ANB's affairs through that pattern of racketeering activity. (App. 64, ¶ 26) Petitioners' argument goes to the extent to which Respondents' *evidence* must prove a nexus between the offenses committed by the persons and the respective enterprises they were serving.

The interpretations urged by Petitioners are incorrect and inapposite to this case.

II

THE DISTRICT COURT'S REQUIREMENT OF SOMETHING MORE THAN HARM RESULTING FROM THE PREDICATE ACTS INJECTED UNINTENDED WORDS AND MEANINGS INTO RICO

Introduction

Despite Petitioners' abandonment of the question presented, Respondents here discuss that issue because this Court has decided that its importance is worthy of consideration.

A. The District Court's Imposition Of A "Racketeering Injury" Requirement Is Indecipherable

The District Court dismissed the complaint for want of a "RICO injury", following the opinions of several other courts. *Haroco v. American Nat. Bank & Trust Co.,* 577 F. Supp. 111, 113-114 (N.D. Ill. 1983). Those opinions, sometimes referring to "racketeering enterprise injury" or a "distinct RICO injury", invariably begin and end with the requirement that plaintiff show "something more" than injury suffered from RICO's predicate acts.[15]

The "racketeering injury" doctrine is difficult to pin down because it is never defined and those courts adhering to it do not announce what "more" is required than injury resulting from the predicate acts. *See, e.g., Sedima, S.P.R.L. v. Imrex Company, Inc.,* 741 F.2d 482, 494 (2nd Cir. 1984) ("whatever it may be"). This undefined requirement has evoked bafflement from many courts.[16]

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[15] *See* district court cases collected in the Court of Appeals' opinion in *Haroco,* App., 7 (n.4), also listing district court cases rejecting the racketeering injury doctrine. (*Id.,* at 7-8)

[16] *See, e.g., Haroco,* App., 6 ("the district court here did not explain what the requirement is"); *Haroco,* App., 9 ("Neither the district court nor the defendants in their brief have made any effort to

(Footnote continued on following page.)

Beginning with the words of the statute, as we must, *United States v. Turkette,* 452 U.S. at 580, the requirement of "something more" is noticeably absent. If Congress had intended something more than injury occasioned by the predicate acts, it could easily have articulated the extra requirement. The District Court's decision leaves litigants in the dark about whether thay have meritorious claims. For all Respondents can tell, their claims might qualify, unless, as the Seventh Circuit concluded, this doctrine is a mere extension of the discredited "organized crime requirement". (*Haroco,* App., 20, 22)[17]

B. The But-For Test Of Proximate Cause Is Not Applicable To The Pattern Requirement

The District Court, demanding proof that the injury resulted from a racketeering pattern, apparently engaged in a but-for analysis.

In *Bankers Trust Co. v. Rhoades,* 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed,* (No. 84-657), the Second Circuit attempted to define "racketeering injury" in terms of the but-for reasoning on which rests the "something more" holdings in *Landmark Savings and Loan v. Rhoades,* 527 F. Supp. 206 (E.D. Mich. 1981), *North Barrington Development, Inc. v.*

(Footnote continued from preceding page.)

define the requirement ...."); *Eisenberg v. Gagnon,* 564 F.Supp. 1347, 1352-3 (E.D. Pa. 1983) ("Although the Defendants argue that 'something more than an injury stemming from racketeering activity must be alleged' ... it has not been made clear either by the Defendants or the cases so requiring it what that 'something more' would be"). *See also, Alexander Grant & Co. v. Tiffany Industries, Inc.* 742 F.2d 408, 413 (8th Cir. 1984), *petition for cert. filed,* (No. 84-1084); *Ralston v. Capper,* 569 F. Supp. 1575, 1580 (E.D. Mich. 1983).

[17] In *Willamette Savings & Loan v. Blake & Neal Finance Co.,* 577 F. Supp. 1415, 1430 (D. Ore. 1984), the District Judge adopted the comment on pornography in *Jacobellis v. Ohio,* 378 U.S. 184, 197 (1964) (Stewart J., concurring) ("I know it when I see it") as the test to determine whether a racketeering injury occurred.

Fanslow, 547 F. Supp. 207 (N.D. Ill. 1980)[18] and the District Court in this case.

> The *Bankers Trust* Court stated:
>
> If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern, and the pattern cannot be said to be the but-for cause of the injury.

741 F.2d at 517. That reasoning is incorrect because causation analysis is not applicable to the "pattern" requirement of RICO.

Statutes that create rights of action generally contain requirements of two different kinds of elements. One is the proscribed conduct which causes the expected harm; the other requirements represent the legislature's desire to set the boundaries of the statute's application. For causation purposes, the latter are irrelevant. For example, The Civil Rights Act of 1964 requires proof that the employer has at least 15 employees. 42 U.S.C. § 2000e(b). A Title VII plaintiff must survive a but-for test regarding the employer's discrimination, but the plaintiff need not prove he would have suffered no harm had there been only 14 or less employees. Discriminatory refusal to hire, like the predicate acts in RICO, is the harm-causing event while the 15 employee limitation, like the "pattern" provision in RICO, merely reflects Congress' desires to give the statute less than universal application.

Even in the absence of guidance from Congress, the courts look to (1) the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) more particularly, whether the injury alleged was the form of injury about which Congress was likely to have been concerned. *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 478 (1982). Since RICO unambigously aims at the deleterious effects of the

[18] *North Barrington* was authored by the District Judge in this case.

offenses Congress deemed typical of organized crime (pp. 23-26, *post*), there is no occasion to look farther in order to identify the particular element of the Act to which a but-for test applies.

Using arson as an example, it is arson that Congress envisioned as causing harm, not a pattern of arsons. It was certainly known by Congress that an arson victim's harm is no different when the injury results from the arsonist's first offense than the arsonist's second offense. The pattern requirement was inserted in RICO to identify criminal activities typical of organized crime.[19] That requirement focuses on the criminal and his conduct, not the plaintiff or the nature of his harm. *Bankers Trust,* 741 F.2d at 522 (n.1) (Cardamone, J., dissenting). The significance of the pattern in RICO is that the defendant's activities thereby qualify for the punitive and remedial treatment prescribed by Congress.[20]

Of course, it is not enough for a plaintiff to survive a but-for test; he must also satisfy the other aspects of proximate cause. He is required to show either a direct connection

[19] "The term 'pattern' indicates that what is intended to be proscribed is not a single, isolated act of 'racketeering activity' . . . ." Dep. Att'y Gen. Aug. 11, 1969 ltr. to Sen. McClellan, S. Rep. No. 617, 91st Cong., 1st Sess., 122 (1969).

"The concept of 'pattern' is essential to the operation of the statute. One isolated 'racketeering activity' was thought insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense. The target of title IX is thus not sporadic activity." S. Rep. No. 617, 91st Cong., 1st Sess., 158 (1969).

[20] *Bankers Trust* is incorrect in another respect. In both of the hypothetical examples (*Bankers Trust,* 741 F.2d at 517), the court assumed that the pattern requirement restricts recoveries to persons themselves injured enough times to comprise a pattern. Under that but-for test, a court deciding whether a pattern exists must ignore all offenses except those committed against the plaintiff. Obviously, Congress did not intend to restrict recovery to those persons who have each suffered harm from murder or kidnapping more than once.

between the criminal act and his injury or that he was the intended victim. Thus a victim's supplier cannot recover damages for losing a customer because, being neither a target nor a direct victim, he is a mere bystander.

Courts employing the "something more" doctrine typically cite *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477 (1977), because that case turned on the analogous "by reason of" provision in Section 4 of the Clayton Act. Courts and commentators taking the opposite side frequently argue that Congress, at the urging of the American Bar Association, passed RICO as a separate statute rather than include it in the Sherman Act, in order to avoid the strict standing, proximate cause, and target-area doctrines which have evolved under the antitrust laws.

In *Brunswick,* plaintiff sought to recover for sales lost to defendant, where defendant's presence in the market was made possible by its alleged violation of Section 7 of the Clayton Act. This Court held that it was not enough for a plaintiff to show merely a but-for connection between defendant's violation of Section 7 and plaintiff's injury:

> [A plaintiff must] prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the *antitrust* laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'

429 U.S. at 489. *Brunswick* holds in a familiar way that civil recovery requires more than demonstrating merely that but for the violation the plaintiff would not have been harmed. *Brunswick*'s analysis of the "type of loss" focused not on the injury but the manner in which it occurred—the connection between the violation and the injury. The kind of harm alleged in

Brunswick was not within the class of injuries Section 7 was intended to forestall, 429 U.S. at 487-488 (e.g., losses caused by predatory selling). The injury in *Burnswick* was fortuitous vis-a-vis the defendant's violation because the plaintiff was only a bystander.

The concern about putting RICO into the Sherman Act, presumably shared by Congress in accepting the advice of the American Bar Association, was two-fold: (1) commingling the two might have an undesirable impact on the antitrust laws and (2) it might pose inappropriate and unnecessary obstacles to RICO plaintiffs.[21] *Brunswick*'s denial of recovery for fortuitous injuries logically applies to virtually all statutory recoveries, RICO included. But *Brunswick* had no occasion to identify the elements of a statute that require proof of causational links and segregate those elements from the other requirements in the statute.

The "by reason of" requirement of Section 1964 means no more than it usually means: the plaintiff must be within the class of persons protected by the statute and the plaintiff's injury must be of the kind which the statute intended to forestall. As stated by the Seventh Circuit:

> As we read this "by reason of" language, it simply imposes a proximate cause requirement on plaintiffs .... This causation requirement might not be subtle, elegant or imaginative, but we believe it is based on a straight-

[21] *Hearings on S.30, Subcommittee No. 5 of House Comm. on the Judiciary,* 91st Cong., 2d Sess., 147-49 (1970). While the ABA report mentioned proximate cause as an example, it is doubtful that either the ABA or Congress intended to do away entirely with proximate cause as a requisite element of recovery—merely that the standing to sue and proximate cause requirements as evolved under the antitrust laws are too strict for RICO. Of course, if that is what was intended, the holdings of *Bankers Trust* and the District Court in this case require even less comment than is afforded here.

> forward reading of the statute as Congress intended it to be read.[22]

(*Haroco*, App., 28)

As *Turkette* teaches, Congress' declared aim was to provide enhanced sanctions and new remedies "to deal with the unlawful activities of those engaged in organized crime". *Turkette,* 452 U.S. at 589. The "unlawful activities" are precisely the predicate acts described in Section 1961(1).

In rejecting the District Court's rationale, the Seventh Circuit aptly noted that those courts espousing "RICO-injury" and "something-more" requirements engaged in nothing more than an attempt to renew an earlier fashioned "organized crime" requirement. (*Haroco*, App., 20, 21) That now obsolete doctrine is worthy of exploration because it shares with the District Court the view that RICO should apply only where the defendant was involved in organized crime.[23]

C. RICO Is Not Limited To Offenses Committed By Organized Crime

In response to early RICO civil suits, some courts reasoned that Congress' underlying purpose of attacking organized crime (and the very title of Chapter IX) justified restriction of RICO's application to organized crime. *See, e.g., Adair,* 526 F. Supp. at 746-47. Congress' concern with organized crime was the underlying reason for the enactment of RICO. *Turkette,* 452 U.S. at 589. But Congress did not (and could not) confine its application to organized crime.[24]

[22] Petitioners now concede that they "do not quarrel with this proximate cause analysis". (Petrs. Brf., 12)

[23] *See, e.g., Barr v. WUI/TAS, Inc.,* 66 F.R.D. 109 (S.D.N.Y. 1975); *Waterman S.S. Corp. v. Avondale Shipyards, Inc.,* 527 F. Supp. 256 (E.D. La. 1981); *Adair v. Hunt Int'l Resources Corp.,* 526 F. Supp. 736 (N.D. Ill. 1981).

[24] That Congress "wanted to but couldn't" is not obvious. Presumably most members of Congress espouse Constitutional prin-

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The scope intended by a statute need not be as narrow as the underlying policy considerations that first prompted Congress to act. As enacted, RICO's intended coverage was broader than organized crime. As Senator McClellan pointed out, the Constitution applies to everyone, including those engaged in organized crime. 116 Cong. Rec. 18,914 (1970).

At least three reasons impelled Congress to draft RICO more broadly than merely to embrace organized crime. First, Congress considered and explicitly rejected the attempts to create a "status offense", on Constitutional grounds. For example, when Rep. Biaggi proposed an amendment that would criminalize membership in the "Mafia" or "La Cosa Nostra", it was pointed out that such an amendment would violate Constitutional principles and contravene this Court's rulings striking down statutes that created status offenses or outlawed membership in certain organizations.[25] *See, Bennett v. Berg,* 685 F.2d 1053, 1063 (8th Cir. 1982), *aff'd en banc,* 710 F.2d 1361, *cert. denied,* 104 S.Ct. 527 (1983). *In re Catanella,* 583 F. Supp. 1388, 1428-9 (E.D. Pa. 1984); Note, *Civil Rico:*

(Footnote continued from preceding page.)

ciples as much because of their own belief in them as for obedience to the Constitution and this Court. As stated by Congressman McClory (a member of the House Subcommittee considering S. 30):

> Precedents as contained in numerous court decisions were reviewed and weighed—and every effort was made to produce a strong and effective tool with which to combat organized crime—and at the same time deal fairly with *all* who might be affected by this legislation—whether part of the crime syndicate or not.

116 Cong. Rec. 35,204 (1970) (emphasis added).

[25] *See* Statement of Rep. Poff, citing *Robinson v. California,* 370 U.S. 660 (1962), *Scales v. United States,* 367 U.S. 203 (1961), and *Lanzetta v. New Jersey,* 306 U.S. 451 (1939). 116 Cong. Rec. 35,344 (1970). *See also* Statement of Rep. Celler, 116 Cong. Rec. 35,343-44 (1970).

The Temptation and Impropriety of Judicial Restriction, 95 Harv. L.R. 1101, 1107-8 (1982); D. Moran, *Pleading a Civil Rico Action Under Section 1962(c)* [*etc.*], 57 Temple L.R. 731, 748 (n.79) (1984).

Second, Congress found it difficult, if not impossible, to define "organized crime" with any precision. As stated by Rep. Poff:

> [I]t is probably impossible precisely and definitively to define organized crime. 116 Cong. Rec. 35,204 (1970)
>
> * * *
>
> The curious objection has been raised to [RICO's provisions] that they are not somehow limited to organized crime—as if organized crime were a precise and operative legal concept, like murder, rape, or robbery. Actually, of course, it is a functional or sociological concept like white-collar or street crime serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances. 116 Cong. Rec. 35,344 (1970).

The elusive character of the phrase "organized crime" was one of the reasons for RICO's breadth. *See, Schacht v. Brown* 711 F.2d at 1354-5; *In re Catanella,* 583 F. Supp. at 1429.

Third, RICO was liberally drafted so that its potency would not be reduced by difficult or impossible burdens. Note, 95 Harv. L. Rev., *supra* at 1108-9; Moran, 57 Temple L. Rev., *supra* at 748. An important part of the motivation for RICO's passage was Congress' frustration at the ease with which organized crime escapes punishment.[26]

Courts have frequently observed that a requirement of demonstrating affiliation with organized crime would emascu-

[26] *See, e.g.,* Statement of Sen. McClellan (organized criminals able to "insulate" themselves) 116 Cong. Rec. 586 (1970); Statement of Sen. Hruska (difficulties in proving link between criminal group members and illicit activities they sponsor). (*Id.* at 601).

late RICO's provisions.[27] In construing the Travel Act, the Ninth Circuit made the following statement, which is fully applicable in the present context:

> It would usually be difficult, if not impossible, to prove that an individual or business was associated with or controlled by a clandestine criminal organization. It might also be difficult to prove that a particular offense was of the kind commonly engaged in by organized criminals in [the year] 1961; and, in any event, such a restriction upon the statute's coverage would provide an easy avenue for evasion through adoption of new forms and techniques of illicit trafficking.

United States v. Roselli, 432 F.2d 879, 885 (9th Cir. 1970), *cert. denied,* 401 U.S. 924 (1971).

Thus, one of the reasons why Congress drafted the statute's provisions broadly was to ensure that difficult proof requirements would not thwart the objectives of RICO:

> ... Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety fraud actionable in federal treble damages proceedings—the price of eliminating all possible loopholes.

Sutliff, Inc. v. Donovan Cos., Inc., 727 F.2d 648, 654 (7th Cir. 1984).

Congress was well aware that in order effectively to reach "organized crime", RICO would necessarily cover other offenders. As stated by Senator McClellan:

> The Senate Report does not claim, however, that the listed offenses are committed primarily by members of organized

[27] *See, e.g., In re Catanella,* 583 F. Supp. at 1429 (n.60); *Kimmel v. Peterson,* 565 F. Supp. 476, 492 (E.D. Pa. 1983); *Hanna Mining Co. v. Norcen Energy Resources Ltd.,* 1982 Fed. Sec. L. Rep. (CCH), ¶98,742 at 93,736-7 (N.D. Oh. 1982); *U.S. v. Chovanec,* 467 F. Supp. 41, 45 (S.D.N.Y. 1979).

> crime, only that those offenses are characteristic of organized crime ... It is impossible to draw an effective statute which reaches most of the commercial activities or organized crime, yet does not include offenses commonly committed by persons outside organized crime as well. 116 Cong. Rec. 18,940 (1970).

Accordingly, Congress drafted the statute so as to embrace conduct *typical* of organized crime, thereby cutting a "deliberately broad swath" which embraced persons beyond the pale of organized crime.[28] *Schacht v. Brown,* 711 F.2d at 1353.

Thus, Section 1961(1) identified those *offenses* Congress thought to be typical of organized crime. Similarly, since organized crime typically engages in repetitious criminality, Section 1961(5) requires a *pattern* of multiple acts. As thus crafted, RICO applies to all persons whose conduct fits those criteria. The district court decisions restricting civil RICO to cases involving organized crime were overwhelmingly rejected by every Court of Appeals and most district courts faced with that argument.[29]

D. The District Court's Decision Would Stultify Congress' Purpose Underlying The Private Damage Remedy

Congress' grant of private rights of action, especially considering the treble damage and attorney's fees provisions, reflects Congress' desire to enlist the resources of private litigants to enforce the Act. *Cf. Illinois Brick Co. v. Illinois,* 431 U.S. 720, 745-6 (1977); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130-131 (1969); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.,* 392 U.S. 481, 494 (1968). Speaking to the amendment adding a private damage remedy, Senator McClellan urged that it would provide "a major new tool". 116 Cong. Rec. 25,190 (1970).

[28] As Petitioners concede, Congress intended RICO to cover "commercial fraud". (Ptrs' Br., 11)

[29] *See* cases collected in *Haroco,* at App., 13.

This Court's view of the "by reason of" provision in Section 4 of the Clayton Act is that:

> Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations .... [citations omitted]

Blue Shield, 457 U.S. at 472. The direct victims of RICO's predicate acts are the potential plaintiffs upon whom civil enforcement depends, *viz.* "an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest". *Assoc. General Contractors v. California State Council of Carpenters,* 459 U.S. 519, 542 (1983). The District Court's decision would destroy the central mechanism on which the private enforcement scheme of RICO depends.

E. The Seventh Circuit's Decision Was Correct

Those courts requiring an "organized crime" nexus, "competitive injury", "distinct RICO injury" or "racketeering injury", ran afoul of not only the "plain meaning" rule of statutory interpretation, *Turkette,* 452 U.S. at 580; *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980); they went against the grain of the Constitutional scheme of separation of powers. *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 194-5 (1978); *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625-26 (1978).

The wide scope of RICO's provisions for civil damage recovery, with its consequent propensity to add "garden-variety" cases to the burdens of the federal courts, was undoubtedly the reason for the incorrectly restrictive decisions of the District Court here and those noted above. But RICO, as written, is broad, not ambiguous (*Haroco,* App., 28) and RICO is deliberately broad. *Schacht,* 711 F.2d at 1353. Congress was fully aware of and intended that it was entering a new domain of federal involvement. *Turkette,* 452 U.S. at 586-7.

In *Reiter v. Sonotone Corp.,* 442 U.S. 330, 344 (1979), this Court stated:

> Respondents also argue that allowing class actions to be brought by retail consumers like the petitioner here will add a significant burden to the already crowded dockets of the federal courts. That may well be true but cannot be a controlling consideration here. We must take the statute as we find it.

That view is poignantly applicable to RICO.

Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress. *United States v. Rogers,* ____ U.S. ____, 104 S. Ct. 1942, 1948 (1984). Courts have no authority to substitute their views for those expressed by Congress in a fully enacted statute. *Tennessee Valley Authority v. Hill,* 437 U.S. at 194-5. As Petitioners note, Senator Thurmond has announced his intention to conduct hearings on whether RICO should be amended. (Petrs. Brf., 9, n.6) That is where such matters must be decided.

The Seventh Circuit correctly rejected the District Court's requirement of a distinct RICO injury and the Second Circuit's holding that a but-for analysis is to be applied separately to the "pattern" requirement of the Act. (*Haroco,* App., 25-27) A plaintiff who suffers an injury caused by one or more of the predicate acts is entitled to damages, so long as he is either a target or a direct victim.

The Seventh Circuit's decision was correct.

III

THE ARGUMENTS OF AMERICAN BANKERS ASSOCIATION ARE INCORRECT AND NOT PROPERLY BEFORE THIS COURT

The *amicus curiae* brief of American Bankers Association ("the Association") offers three interpretations of Section 1962(c) not previously discussed herein: (1) a violation occurs only when the pattern is committed "in a fashion one would expect of true racketeers" and "gangsters" (Amicus Brf., 9, 12), (2) a "pattern of racketeering activity" may require more than two predicate acts (*Id.*, p. 10), and (3) there must be separately a person and an enterprise (*Id.*, p.15).

A. A Requirement That The Crimes Be Committed In Typical Gangster Fashion Is Untenable

Congress did not employ the phrase "typical of a gangster" or any other phrase that characterizes organized crime more narrowly than by the words of the statute. RICO's reach having been thus narrowed to Congress' satisfaction, it is not for courts or lawyers to engraft additional qualifying factors.

Had Congress explicitly established the Association's standard, Section 1962(c) would undoubtedly be void on account of vagueness. *See, United States v. Culbert,* 435 U.S. 371, 374 (1978); *Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1926). Obviously, unconstitutional interpretations by courts are no more permissible than unconstitutional acts of Congress. The Association's argument should be rejected for the additional reason that courts interpret statutes to resolve ambiguities rather than beget them. *Turkette,* 452 U.S. at 587 (n.10).

There is no support either within or outside the statute to support such an interpretation. The legislative history shows that Congress intended RICO to apply to offenses other than those committed in gangland style. This suggestion of the

Association not only engages in the unacceptable process of resuscitating the "organized crime" limitation; it would not even effectively accomplish its obvious purpose. It would ensnare a non-gangster who might seem to act like a "gangster" and yet it would permit escape by a mild mannered gangster.

The Association apparently believes that whether RICO is violated depends on whether the alleged violator is unsavory. It is the other way around.

B. The Number Of Offenses Necessary To Comprise A Pattern Is Not At Issue

The point that the pattern requirement is not necessarily satisfied with two predicate acts may or may not be correct, but the complaint does not rest on only two acts of mail fraud. The complaint alleges eleven instances of fraudulent loans (App. 59-60, ¶¶ 11, 13) and alleges that the fraudulent declarations of fictitiously high prime rates, billings, and collections thereof, occurred on "many occasions". (App. 61, ¶ 18)

C. The Requirement Of A Separate Person And Enterprise Is Not At Issue

The Seventh Circuit took up the question whether the person and the enterprise must be separate entities. (*Haroco,* A-1, 30-38) That issue affected only the portion of Count I alleging that ANB is liable as a person conducting its own affairs. Respondents lost on this point but did not seek *certiorari.*[30] That issue is not before this Court.

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[30] The other aspect of Count I, alleging that ANB is liable as a person conducting the affairs of Heller, remains intact. (*Haroco,* A-37)

CONCLUSION

The interpretations of RICO sought by Petitioners and the American Bankers Association are imaginative efforts to rewrite the statute. Masked in tones of moderation, they urge interpretations of Section 1962(c) that would emasculate the Act and frustrate Congress' central purpose, for both criminal and civil purposes.

The Seventh Circuit should be affirmed.

Respectfully submitted,

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